TAN AIK HOE & ORS *a*

v.

TAN BOON CHIA & SONS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
KANG HWEE GEE J
[COMPANIES WINDING-UP NO: D5-28-325-92]
6 SEPTEMBER 2001

CIVIL PROCEDURE: *Consent order - Summons for direction for an order to fix time limit for compliance - Whether correct and appropriate means by which consent order should be executed - Effect of "at liberty to apply" provision of consent order - Availability of contempt proceedings for non-compliance* *c*

By way of a summons for direction, the petitioners applied for an order to fix a time limit for compliance of a consent order entered into between the petitioners and the respondents in a winding-up petition. The respondents objected to the application on the ground that the petitioners had yet to carry out certain obligations under the consent order, and until the said obligations were carried out, the respondents were not obliged to comply with the order sought. *d* *e*

The issue was whether the summons for direction was the correct and appropriate means by which the consent order should be executed notwithstanding that the consent order did make a provision that each party was "at liberty to apply". *f*

Held:

[1] The inclusion of the term "with liberty to apply" in the consent order provides the means by which the parties may return to seek the direction of the court to fine tune the obligations of the parties to bring the litigation to an expeditious end. That expression occurs where there is a need for the court to take part in some minor non-contentious post litigation management of an order where some form of supervision may be required. It follows that a direction given on a "liberty to apply" provision of a consent order can only be given in applications of a non-contentious nature where all the obligations of the parties have been executed and where there is no substantial dispute on the facts. Therefore, where there is a substantial dispute as to whether each party has fulfilled his obligation under the consent order, the matter cannot be obviously settled on a summons for direction. The dispute must be adjudicated upon and the summons for direction is not the correct forum to resolve disputes. (see p 629 f-g; p 630 c-e) *g* *h* *i*

[2] Provided that the petitioners themselves had complied with all their obligations under the consent order and it became obvious that the respondents were *mala fide* in refusing to comply, the doors were open to the petitioners to initiate contempt proceedings against the respondents for refusing to obey the said order. Where appropriate, to break the impasse the parties might have to resort to re-litigate on the consent order itself, for the consent order had given rise to a new contract. (see p 630 e-f)

[Summons for direction dismissed.]

Case(s) referred to:
Abbott v. Abbott [1937] 100 LPJ 39 ***(refd)***
Cristel v. Cristel [1951] 2 All ER 574 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218

For the petitioners - Dr Manjit Singh Sachdev (Wong Weng Woh, Rajinder Singh, Dir Kheizwan Kamaruddin); M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the respondents - Su Tiang Joo (Jayne Koe); M/s Cheah Teh & Su

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

Enclosure 22
By this application which they chose to label as a "summons for an order to fix time for obeying consent order dated 5 September 1995", the petitioners seek the following orders:

(a) that the Respondents do within fourteen (14) days from the date of this order made hereto takes steps to transfer the sawmill licence belonging to Kilang Papan Loong Sing Sdn. Bhd. (hereinafter referred to "the said Company") to the 5th Petitioner as in accordance to the Consent Order dated 5th September, 1995;

(b) that the Respondents do take steps to dispose off the one tenth (1/10) undivided share of the land held under Certificate of Title No. 13719 Lot No. 6015 Mukim Batu, Daerah Kuala Lumpur (hereinafter referred to as "the Batu Caves Land") register in the name of the said Company within fourteen (14) days from the date of this order or transfer the one twentieth (1/20) undivided share of the said Batu Caves Land to the Respondents and the shares of the said Company be transferred to the Petitioners to give effect to the Consent Order dated 5th September, 1995;

(c) that the Petitioners' Solicitors M/s Manjit Singh Sachdev, Mohammad Radzi & Partners be authorised to forthwith release all monies together with interest held by the said Solicitors to the Petitioners from the date of this Order;

(d) that the Petitioners' solicitors M/s Manjit Singh Sachdev, Mohammad Radzi & Partners hold the shares of the Petitioners in the said Company as stakeholder until such time the said Batu Caves Land of the one tenth (1/10) undivided share be dispose of and proceeds be distributed accordingly or the one twentieth (1/20) undivided share of the said Batu Caves Land be transferred out of the said Company to the Respondent and the share of the Respondent in the said Company be transferred to the Petitioners;

(e) that the costs of this application be paid by the Respondents;

(f) such further and other relief as this Honourable Court deems fit and just and each party shall be of liberty to apply.

The prayers sought arose from a consent order entered into between the petitioners and the respondents in a winding-up petition under s. 218 of the Companies Act 1965.

The consent order was drafted in a very detailed and complicated manner. It runs into a few pages and appears in full in exh. KLPS1 of the supporting affidavit of the petitioners in encl. 22. The directions in which the petitioners seek in this application however, appear to relate only to the respective portion of the consent order as follows:

Prayer (a) relates to the following consent order:

> ... **BY CONSENT IT IS ALSO ORDERED** that the petitioners and the 2nd respondent upon delivery of vacant possession of the said lands to the 1st Respondent Company do cause the sawmill licence registered in Kilang Papan Loong Sing Sdn. Bhd. to be transferred to the petitioners or their nominees for a total consideration of RM5,000.00 to be paid to the 2nd Respondent subject always to the Petitioners having first deposited with the 1st Respondent's solicitors all their share certificates, valid and registrable Memorandum of Transfer, letters of resignation as directors of Kilang Papan Loong Sing Sdn. Bhd ...

Prayers (b) and (d) relate to the order:

> ... **BY CONSENT IT IS ALSO ORDERED** that should Kilang Papan Loong Sing Sdn. Bhd. succeed in disposing of their one tenth (1/10) undivided shares in the land held under Certificate of Title No. 13719 Lot No. 6015, Mukim Batu, Daerah Kuala Lumpur (hereinafter referred to as the "Batu Caves Land") within 16 months from the date hereof, half of the said proceeds of sale shall

be paid to the Petitioners and the other half to the 2nd Respondent and the 2nd Respondent shall be entitled to apply his half share of the proceeds of such sale against the purchase price of the 2nd to 8th Petitioners' shares in the 1st Respondent Company and towards this end, the Petitioners shall assist in disposing the said Batu Caves Land at market value as expeditiously as possible ...

Prayer (c) relates to the order:

... **BY CONSENT IT IS ALSO ORDERED** that the 2nd Respondent do pay the Petitioners the sum of RM3,849,090.00 being the total purchase price of the said shares by way of an initial payment of RM308,109.00 to the Petitioners' solicitors, Messrs Manjit Singh Sachdev, Mohammad Radzi & Partners (hereinafter referred to as the Petitioners' solicitors) and that the balance of the purchase price be paid by the 2nd Respondent to the said Petitioners' solicitors within sixteen (16) calendar months in the following manner:

(i) the initial payment of RM308,109 is to be paid by way of:

a) the immediate uplifting of the fixed deposit receipt of RM440,578.81 standing to the credit of Kilang Papan Loong Sing Sdn. Bhd. as at 6 June 1995 with interest continuing to accrue thereon;

b) 50% of the proceeds from the fixed deposit receipt less a sum of RM50,000 is to be remitted to the petitioners' solicitors towards account of payment of and deemed payment by the 2nd respondent of the aforesaid RM308,109;

c) a further sum of RM36,826.91 shall be deducted from the balance 50% of the proceeds of the said fixed deposit receipt (less the said RM50,000) and also be remitted to the petitioners' solicitors towards account of payment and deemed as payment by the 2nd respondent of the aforesaid RM308,109;

d) the balance sum then found due is to be paid forthwith to the petitioners' solicitors to make up the full payment of RM308,109;

e) for clarification, the said RM50,000 is to remain in the accounts of Kilang Papan Loong Sing Sdn. Bhd. to defray disbursements and expenses therefor;

(ii) that a sum of RM76,800 to the petitioners' solicitors being full payment of the 1st petitioner's shares in the 1st respondent company in return for an immediate delivery of all his share certificates together with a valid and registrable memorandum of transfer form apart from the stamp duty

payable thereon to the 2nd respondent and/or the 1st respondent's solicitors, Messrs. Cheah Teh & Su (hereinafter referred to as "1st respondent's solicitors");

(iii) that the balance purchase price of RM3,464,181 is to be paid to the said remaining 2nd to 8th petitioners' solicitors within sixteen (16) calendar months from the date of final payment in (i)(d) above by way of four (4) equal instalments, the 1st instalment whereof shall commence four (4) months from the date of final payment of (i)(d) above and each of the remaining three (3) equal instalments on every four (4) monthly intervals thereafter;

(iv) provided always that the 2nd respondent be further entitled to a grace period of a further three (3) weeks from the date/day of each payment due as aforesaid to effect payment(s) thereof;

The respondents have strenuously objected to the application. They have filed affidavits to oppose the summons for direction basically on the common ground that the petitioners have yet to carry out certain obligations under the consent order, and until they are carried out they are not obliged to comply with the order sought.

The parties have submitted at length on whether the summons for direction is the correct and appropriate means by which the consent can be executed in the terms set out, notwithstanding that the consent order does make a provision that each party is "at liberty to apply".

I would accept as entirely correct the submission of counsel for the petitioners that the inclusion of the term "with liberty to apply" in the order provides the means by which the parties may return to seek the direction of the court to fine tune the obligations of the parties to bring the litigation to an expeditious end. I would add that the expression occurs where there is a need for the court to part take in some minor non-contentious post litigation management of an order where some form of supervision may be required.

Thus in a matrimonial settlement a spouse receiving a fixed allowance by a court order 'with liberty to apply' for the maintenance of a child in her custody, is competent to apply to the court to increase the child's allowance upon reaching a certain age in accordance with his needs.

To quote Langton J in *Abbott v. Abbott* [1937] 100 LPJ 39:

> The expression 'liberty to apply' means what it says, namely, that leave was reserved to both parties to make any application concerning any part of the order at any subsequent time.

Commenting on Lawton J's rendition of the term, Denning LJ said in *Cristel v. Cristel* [1951] 2 All ER 574 at 577:

> If there was an unforeseen change of circumstances, as, for instance, if the wife was left by will another house or if she took an adulterer to live with her in this house, I should have thought the 'liberty to apply' would enable the court to remedy the position – I should have thought the case of *Abbott v. Abbott* was sufficient authority for that – but when there is no change of circumstances, I do not think the court can alter or vary the agreement of the parties under "the liberty to apply." It can only do what is necessary to carry the agreement into effect."

It follows that a direction given on a 'liberty to apply' provision of a consent order can only be given in applications of a non-contentious nature where all the obligations of the parties have been executed and where there is no substantial dispute with respect to facts upon which the new order would have to be assessed. Where therefore there is a substantial dispute as to whether each party has fulfilled his obligation under the consent order, the matter cannot obviously be settled on a summons for direction. The dispute must first be adjudicated upon and a summons for direction is not the correct forum to resolve disputes.

Provided that they have themselves complied with all their obligations under the consent order and it becomes obvious that the respondents are *mala fide* refusing to comply, the doors are open to the petitioners to initiate contempt proceedings against the respondents for refusing to obey the order. Where appropriate, to break the impasse the parties may have to resort to re-litigate on the consent order itself, for as counsel for the respondents has rightly submitted, the consent order has given rise to a new contract.

In the event I am constrained to agree with the submission of counsel for the respondents that the summons for directions filed by the petitioners is not in order and should be dismissed with costs.